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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-182

JIFFY JUNE FARMS, INC., ET AL.,
Petitioners,

versus

ARTHUR COLEMAN, ET AL., AND JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

JIFFY JUNE FARMS, INC., ET AL.,
Petitioners,

versus

ARTHUR COLEMAN, ET AL., AND JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jiffy June Farms, Inc., et al.,[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in *Arthur Coleman, et al.,*[2] *v. Jiffy June Farms, Inc., et al.* and *James D. Hodgson, Secretary of Labor, United States Department of Labor, v. Jiffy June Farms, Inc., et al.* on November 29, 1971; as to which a motion for re-hearing was denied on May 17, 1972.

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[1]Jiffy June Farms, Inc., Jiffy Poultry, Inc., and Robert A. Trainor, Jr.

[2]Arthur Coleman, Willie Williamson, L. C. Pettway, Elijah Black, Earnest Coleman, Eddie Lee Yelder, Earnest Tolbert and Joseph Simon.

CITATIONS TO OPINIONS BELOW

The opinion of the district court (R. 291-307), printed in Appendix B hereto, *infra*, p. 12a, is reported in 324 F. Supp. 664. The opinion of the court of appeals, printed in Appendix B hereto, *infra*, p. 28a, is reported in 458 F2d 1139.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1971. Rehearing was denied on May 17, 1972. The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

QUESTIONS PRESENTED

Whether employees, or the Secretary of Labor acting in their behalf under the authority of 29 USCA § 217, may sue in court to recover overtime allegedly withheld in violation of the Fair Labor Standards Act if prior to the filing of the action the employees had been finally determined to be exempt from the overtime provisions of that act through grievance procedure established by grievance and arbitration provisions of a collective bargaining agreement without alleging and proving that the union of which they were members breached its duties of fair representation in its handling of the employees' grievance.

Whether, under the *de minimis* rule, the Secretary of Transportation[3] is denied the power under § 204 of the Motor Carrier Act, 1935, to establish qualifications and maximum hours of service for a group of full time truck driver-loaders, numbering from ten to twenty-one, employed by a poultry and egg distributor, where any of them may be selected each week to make one or two trips across state lines and any of them, three or more times a week, may be selected to transport goods that originated out of state from a public warehouse to the distributor's place of business.

Whether an employer acting in good faith and having reasonable grounds for believing that his acts or omissions were not in violation of the Fair Labor Standards Act committed a "willful violation" within the meaning of the term as used in Section 6(a) of the Portal-to-Portal Act of 1947, as amended, 49 U.S.C.A. 225(a) by withholding overtime compensation from employees thought to be exempt.

STATUTES INVOLVED

Department of Transportation Act, 1966:
(Pub. L 89-670, October 15, 1966, 80 Stat. 931, 49 USC 1651 *et seq.*)
Section 6(e)(6)(c), 49 USC 1555(e)(6)(c)

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[3]This power was originally vested in the Interstate Commerce Commission. However, Public Law 89-670, October 15, 1966, 80 Stat. 931, which created the Department of Transportation, transferred this power to the Secretary of Transportation.

Fair Labor Standards Act, 1938:
(c. 676, 52 Stat. 1060, as amended, 29 USC 201 *et seq.*)
Section 7, 29 USC § 207
Section 13(b)(1), 29 USC § 213(b)(1)
Section 15(a)(2), 29 USC § 215(a)(2)
Section 16(b), 29 USC § 216(b)
Section 17, 29 USC § 217

Motor Carrier Act, 1935:
(c. 498, 49 Stat. 543, as amended, 49 USC § 301 *et seq.*)
Section 203(a)(10), 49 USC § 303(a)(10)
Section 204(a)(3), 49 USC § 304(a)(3)

Portal-to-Portal Act, 1947:
(c. 52, 61 Stat. 84, as amended by section 601 of the Fair Labor Standards Amendments of 1966, 80 Stat. 830, 29 USC 251 *et seq.*)
Section 6(a), 29 USC 255(a)

STATEMENT OF THE CASE

On January 29, 1969, Arthur Coleman and seven other named individuals brought a civil action to recover overtime compensation alleged to be due from August 19, 1966, liquidated damages, cost, and attorney fees from Jiffy June Farms, Inc. (Jiffy Farms), Jiffy Poultry, Inc. (Jiffy Poultry), and Robert A. Trainor, Jr. (Trainor); pursuant to Section 16(b) of the Fair Labor

Standards Act, as amended, 29 U.S.C. § 216(b). (R.6-15, R.38-40)

On January 31, 1969, George P. Shultz, Secretary of Labor (Hodgson), brought a civil action, pursuant to Section 17 of the FLSA, 29 U.S.C. § 217, to enjoin Jiffy Farms, Jiffy Poultry, and Trainor from violating the overtime provisions of the Fair Labor Standards Act, and to restrain each of them from withholding payment of overtime compensation allegedly due unnamed employees of Jiffy Farms, Jiffy Poultry, and Trainor. (R.52 et seq.)

Jiffy Poultry admitted that it was subject to the Fair Labor Standards Act and that it had paid no overtime compensation to its truck driver-loaders (R.17-21, 57, 107). Jiffy Poultry contended that its truck driver-loaders were exempt from the overtime provisions of Section 7 of the Fair Labor Standards Act, 29 U.S.C. Standards Act, 29 U.S.C. § 213(b)(1) (R. 22, 60), be- § 207, pursuant to Section 13(b)(1) of the Fair Labor cause its truck driver-loaders were subject to selection to make one or two trips weekly across the state lines and three or more trips weekly to transport goods originating out of state from a public warehouse to its place of business.

Jiffy Poultry also contended that the matter of the exemption of its truck driver-loaders had been finally determined through the grievance procedure established by the collective bargaining agreement covering those employees. (R.22, 59-60). Jiffy Poultry contended further that it had acted in good faith in the

payment of wages of its truck driver-loaders (R. 23, 60).

The Coleman Action and the Hodgson Action were consolidated (R. 111).

On December 28, 1970, the district court made findings of fact. Among them were the following:

Jiffy Poultry regularly made sales and deliveries from Alabama through Florida and back to Alabama as well as small sales and deliveries to Florida. (App. B, p. 14a).

Drivers were not assigned to a particular truck nor to particular routes, but would receive their truck and route assignments on the day the trucks left Jiffy Poultry (App. B, p. 15a).

The drivers picked up and delivered to Jiffy Poultry marked fiberboard boxes purchased from International Paper Company which had been shipped from South Carolina and Florida to a warehouse in Mobile, Alabama (App. B, p. 15a). (The boxes were imprinted with Jiffy Poultry's trademark. R.153).

Employee-union members became dissatisfied with their failure to receive overtime pay, and a grievance hearing was had at which it was agreed that senior employees would be given all time possible over forty hours per week in order to increase their earnings (App. B, p. 16a).

The Department of Labor found that some employees were exempt (from the overtime provisions of the FLSA under the Motor Carrier exemption) and some were not. (App. B, p. 17a).

There was no finding of fact by the district court that the employees were not fairly represented by the union. The issue of unfair representation by the union was not raised in the complaints (R.6-15, 38-40, 52-56), the pre-trial submission (R.100-111), or the order on pre-trial hearing (R.111-114). No evidence was offered to show any alleged unfair representation or failure on the part of the union to provide aggrieved employees with fair and vigorous representation.[4]

The conclusions of law by the district court included the following:

The safety-affecting aspects of the Florida deliveries were minimal, involving as they did, light weight loads and deliveries to a community located on the Alabama-Florida border (App. B, p. 22a).

The fiberboard boxes ceased to be in commerce when they reached the warehouse (App. B, p. 24a).[5]

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[4]One of the plaintiffs, Earnest Tolbert participated in the grievance hearing as shop steward. (R. 194-195).

[5]There was nothing in the record to support the statement in the Conclusions of Law at App. B, P. 24a that "shipments . . . were the property of Jiffy Poultry and were placed in warehouse space leased to Jiffy Poultry . . ." as it applies to the boxes.

The only evidence bearing on the title to the boxes (R. 205-207, 228) and the leasing of the space (R. 205) indicated that the boxes belonged to International Paper until picked up by the employees of Jiffy Poultry and that the warehouse space was not leased by Jiffy Poultry (R. 205-207, 228).

The "minimum of evidence of interstate activity which is minimal in its scope and minimal in its nature" did not support the claim of exemption of the truck driver-loaders from the overtime provisions of the Fair Labor Standards Act (App. B, p. 25a).

Jiffy Farms, Jiffy Poultry and Trainor had acted in good faith and had reasonable grounds for believing that the acts or omissions were not in violation of the Fair Labor Standards Act (App. B, p. 26a).

On December 28, 1970, the district court issued an injunction enjoining Jiffy Farms, Jiffy Poultry, and Trainor from withholding the payment of back wages for three years prior to the commencement of the Hodgson action and from violating Section 15(a)(2) of the Fair Labor Standards Act. (R. 92).

On November 29, 1971, the decision of the district court was affirmed by the court of appeals. Appendix B, *infra*, p. 29a. The opinion set forth a definition of "willful" — "the employer knew or suspected that his action might violate the FLSA." Appendix B, *infra*, p. 33a. (The district court applied a three year period of limitations, but it had not defined the term "willful" nor had it made any finding that the violation was "willful".)

On petition for rehearing, May 17, 1972, the court of appeals reiterated its construction of Section 255(a) of the FLSA and rejected the contention that the matter of the exemption of the truck driver-loaders from the overtime provisions had been settled through the

grievance procedure, terming the settlement of the grievance a "hopeless charade" because the employees were "not fairly represented." Appendix B, *infra*, p. 40a.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Conflict With A Decision Of Another Court Of Appeals.

The decision of the court below regarding the applicability of the overtime provisions of the Fair Labor Standards Act is directly in conflict with that of the Tenth Circuit in *Starrett v. Bruce*, 391 F2d 320, (10th Cir. 1968) cert. denied 393 U.S. 971.

This conflict exists between the conclusion of law made in the instant case that the minimal scope and nature of the truck driver-loaders' interstate activities prevent the application of the motor carrier exemption for overtime and the holding of the Tenth Circuit in *Starrett v. Bruce* that the character of the employees' activities rather than the proportion of either his time or activities determines the actual need for the ICC's power to establish qualifications and maximum hours of service, under Section 204 of the Motor Carrier Act of 1935.

In *Starrett v. Bruce* a truck driver who was employed for ten months by an employer who derived no income from transportation of goods in interstate

commerce[6] during the driver's employment, but who actively sought and would have accepted interstate business,[7] was held to be a truck driver subject to the jurisdiction of the ICC and exempt from the overtime provisions of the FLSA. In the instant case, however, the court below held the limited interstate activity of the truck driver-loaders insufficient to justify the motor carrier exemption. (R.306)

The district court took notice of the principle that the substantiality of the effect of the efforts rather than the amount of time spent on safety related activities is important in granting the motor carrier exemption. (R.302) The decision turned, however, not on whether driving is a safety-affecting activity (it is) nor on whether the truck driver-loaders spent most of their time driving (they do) but on how much interstate activity there was.

Starrett v. Bruce considered the percentage of interstate activity to be irrelevant as long as the em-

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[6]The Motor Carrier Act defines "interstate commerce" as "commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by rail, express, or water." 49 USC § 303(a)(10)

[7]The court below drew a distinction between common and private carriers on the grounds that the percentage of business having an interstate nature is relevant for private carriers but not for common carriers because a common carrier's interstate business may fluctuate. This is faulty because a private carrier's interstate business may fluctuate as well (R. 301) and because the need for safety of operation is the same for both sorts of carriers. See Ex Parte MC-3, Motor Carrier Safety Regulations - Private carriers, 23 MCC(f) 1 (1940)

ployee was engaged in safety-affecting work and the potential for interstate activity existed.

This court should consider this matter to reconcile the conflict between these decisions by courts of appeals.

2. The Questions Presented Are Of Major Importance Within The Field Of Labor Relations Because:

The three questions presented are important in the field of labor relations because a large number of disputes will arise concerning violations of the overtime provisions of the Fair Labor Standards Act which are at the root of the three questions here.

A. *The Role Of Grievance Machinery In Matters Of Alleged Statutory Violation Is Unclear After The Decision Below.*

The first question deals with the relationship of grievance machinery to determination of the applicability of the overtime provisions of the FLSA. Among the important subsidiary questions involved are the effect that a final determination through grievance procedure culminating in arbitration will have on an action by employees to recover overtime allegedly due, the effect of such a determination on a suit on behalf of the employees by the Department of Labor to recover such overtime, the necessity of employing grievance machinery for such a dispute before bringing suit in court, and the necessity of alleging a defect in

the grievance procedure when bringing suit on a matter also subject to determination through grievance procedure.

The decision of the court below effectively denies the need to attack the grievance machinery or the results thereof by allowing recovery of back overtime after the matter was settled by grievance procedures without any allegation of defects in the grievance procedures. Other disputes as to the coverage of FLSA overtime provisions, both before and after grievance procedures have been used, are sure to arise in great numbers, so a settlement of this question by this Court would be in the public interest.

B. *The Extension Of The* De Minimis *Rule By The Court Below Limits The Motor Carrier Exemption Substantially.*

The second question deals with the extent of the motor carrier exemption from FLSA overtime provisions. The use of the *de minimis* rule by the court below to fulltime truckdriver-loaders will bring into dispute the coverage for thousands of employees whose duties are not primarily transportation of goods in commerce but who in the normal course of business engage in such activities from time to time on a regular basis. Such a case has already arisen in New Hampshire in *Crooker v. Sexton Motors, Inc.*, 20 WH 659 (D.C.N.H., 1972) where an employee hired to clean cars and travel to another state to pick up automobiles and spare parts was held to be within the *de minimis*

rule even if he made such trips weekly. The instant case was cited in support of the application of the *de minimis* rule in *Crooker*. Clearly it would be valuable for resolution of many such disputes if the court would consider this question and clarify the *de minimis* rule.

C. *The Term "Willful" As It Applies To FLSA Violations Is Undefined By This Court.*

Finally, a definition of the term "willful" as it appears in Section 6(a) of the Portal-to-Portal Act of 1947 would be useful in many cases where there is dispute as to the period of limitations for actions to recover overtime withheld allegedly in violation of the FLSA. In addition to the instant case, others which required definition of this term have already arisen: *Dowd v. Blackstone Cleaners, Inc.* D. C. Tex 1969, 306 F. Supp. 1276; *Hodgson v. Hyatt*, D. C. Fla. 1970, 318 F. Supp. 390; *Krumbeck v. John Oster Mfg. Co.*, D. C. Wisc. 1970, 313 F. Supp. 257; and *Melton v. Round Table Restaurants, Inc.*, D.C. Ga. 1971, 20 WH 532. Though these cases have involved some definition of the term, they have not been directly concerned as a main issue in the instant case — whether a willful violation can be committed in good faith. A definition of the term "willful" will be important to the settlement of numerous cases of violations of the overtime provisions of the FLSA.

3. There Were Errors In The Decision Of The Court Below Because:

A. *The Court Below Disregarded The Previous Grievance Settlement On Improper Grounds.*

The court below erred in allowing employees and the Department of Labor acting in their behalf to bring suit for back wages on a matter that had previously been settled by a grievance procedure without proving that the union as bargaining agent breached its duty of fair representation in the handling of the employees' grievance.

The court of appeals held that the grievance proceeding was a "hopeless charade" since the employees were "not fairly represented". Appendix B, *infra*, p. 40a. This was error because the fairness of representation had not been raised as an issue in the complaints (R.6-15, 41-43, 52-56), the Pretrial Submission (R.100-111), or the Pretrial Order (R.111-114). Under Rule 16 of the Federal Rules of Civil Procedure, of course, such a pretrial order when entered controls the subsequent course of the action unless modified at the trial to prevent manifest injustice. No request was made that the order be modified, and no evidence was offered at the trial on an issue of unfair representation of the employees.

The court of appeals erred in introducing and deciding an issue not presented at the trial.

The court of appeals did not address the questions of whether the grievance had been finally determined or which of the employees were parties to the grievance,[8] saying that these questions need not be considered because the matter could be decided on other grounds. Appendix B, *infra*, pp. 38a-39a. Had the grievance not been finally determined or had the employees not been parties to it, an important question of whether the employees were required to employ grievance procedure, and whether they were required to pursue it to a final determination if they participated, before bringing suit in court. The court below erred in treating suit in court as an alternative to the grievance procedure culminating in arbitration established by the collective bargaining agreement without proof of some defect in the grievance procedure.

B. *The Court Below Misinterpreted The De Minimis Rule.*

The second major error of the court below was in denying the power of the Secretary of Transportation to establish qualifications and maximum hours of service for truck driver-loaders under the *de minimis* rule. The *de minimis* rule has hitherto been limited in its application to activities with minimal effects on the safety of operations, but the court below has extended it to include interstate activities of full time truck driver-loaders.

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[8]Earnest Tolbert, one of the plaintiffs, participated in the grievance settlement as shop steward. (R. 194-195).

The activities of truck driver-loaders are substantially concerned with safety of operation. To apply the *de minimis* rule in this case is to extend it to include activities of any character, no matter how great their effect on safety, if the primary duties of the employees are not interstate transportation of goods. The test would become, not whether safety-affecting aspects are minimal, but whether interstate activity can be termed minimal.

Previous applications of the *de minimis* rule have been to activities with minimal effect on safety such as loading without discretion or part-time driving as a substitute (*Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, [1946], *Wirtz v. C and P Shoe Corporation*, 336 F2d 21 [5th Cir. 1964]). The truck driver-loaders in this case engage in safety-affecting activities such as driving as a major part of their work.

Conversely, the power of the ICC (which preceded the Secretary of Transportation) to set qualifications and hours has been affirmed previously for drivers no matter how limited their interstate activity (3.65% of the firm's business in *Morris v. McComb*, 332 U.S. 422, (1947); 0.0% of the firm's business in *Starrett v. Bruce*, 391 F2d 32, (10th Cir., 1968) cert. denied 393 U.S. 971. Driving affects safety, so drivers who may engage in interstate activity have been held to be under the power of the ICC.

C. *The Court Below Erroneously Declared Goods Not To Be In Commerce.*

The court below also erred on the question of the power of the Secretary of Transportation to establish qualifications and hours by holding that boxes imprinted with Jiffy Poultry's trademark (R.153) shipped from out of state ceased to be in commerce because they rested temporarily in a public warehouse before being transported to Jiffy Poultry's place of business. The transportation of these boxes was interstate activity by the truck driver-loaders because the boxes remained in commerce until they reached their final destination; and this activity, three or more times weekly, was not "minimal."

As this Court enunciated the rule in *Walling v. Jacksonville Paper Company*, 317 U.S. 564, 568; (1947) goods shipped in interstate commerce to a warehouse "to meet the needs of specified customers pursuant to some understanding with the customer though not for immediate delivery ... remain in commerce until they reach the customer."

Clearly the court below failed to apply this rule to the boxes for Jiffy Poultry; and by finding them not to be in commerce the court below ignored substantial interstate commerce which bears on the question of the overtime exemption of the truck driver-loaders.

D. *The Court Below Defined A "Willful" Violation Too Broadly.*

Finally, the court below erred in holding the employer's action in good faith and with reasonable grounds for belief that his actions were not violations of the Fair Labor Standards Act were willful violations.

A finding of good faith should preclude a finding of willful violation. "Willful" should be defined as in *Gefen v. United States*, 400 F2d 476, 482 (5th Cir. 1968) in which the court below construed "willful" for the purpose of Section 6672 of the Internal Revenue Code to mean "without reasonable cause." Otherwise the three year statute of limitations, punitive in its effect,[9] will be applied where other punitive measures such as liquidated damages are denied because the employer acted in good faith with reasonable grounds for believing he had complied with the law.

4. The Decision Below Conflicts With The Motor Carrier Safety Regulations Issued By The Department Of Transportation.

Motor carriers have a duty to require observance of driver qualifications and maximum hours of service established in Motor Carrier Safety Regulations issued

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[9] In the instant case the employer relied on the advice of counsel and the settlement of the matter through grievance proceedings. Believing the exemption to be applicable, the employer allowed senior employees to work additional hours at straight time rather than hiring additional employees to avoid overtime premium. (R. 295-296) Since the employees would not have received the additional work if the employer believed the overtime premium to be required, back payment of the "overtime" is a windfall to the employees. A three year period of limitation increases the magnitude of this windfall.

by the Department of Transportation (49 C.F.R. Parts 390-397,[10] 49 C.F.R. §390.32. Such regulations are applicable to private carriers, and the term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle," who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise. 49 C.F.R. § 390.33

No minimum is set on the amount of interstate or foreign commerce needed to give the Secretary of Transportation such jurisdiction because the amount of interstate or foreign commerce is irrelevant to the need for safety — involvement in interstate commerce is a jurisdictional key that unlocks the door to regulation.

The district court, however, did not consider the existence of interstate commerce and the safety-affecting nature of driving to be dispositive. Rather, the district court found that the safety-affecting aspects of the interstate trips were minimal, because they involved light weight loads and deliveries to a community (South Flomaton, Florida) located on the Alabama-Florida border. (Opinion R. 302-303)

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[10]This superseded substantially identical Motor Carrier Safety Regulations issued by the Interstate Commerce Commission as of January 1, 1965, then at 49 C.F.R. Parts 190-197.

Significantly, the Motor Carrier Safety Regulations specifically include light vehicles (those with two axles and less than 10,000 lbs. gross weight) 49 C.F.R. § 395.3. And drivers who drive wholly within a 50 mile radius of their garage or terminal are exempt only from the requirement to keep logs. 49 C.F.R. § 395.8(t) Jiffy Poultry's drivers frequently travel more than 50 miles, and the Florida deliveries are more than 60 miles from Mobile. Appendix C, *infra,* p. 42a.

This conflict as to the applicability of Motor Carrier Safety Regulations between the Regulations and the court below should be resolved by this Court in the interests of highway safety as well as settlement of a vital point of labor law.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Willis C. Darby, Jr.
Counsel for petitioners
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CERTIFICATE OF SERVICE

I, Willis C. Darby, Jr., the attorney for Jiffy June Farms, Inc., Jiffy Poultry, Inc. and Robert A. Trainor,

Jr., petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of July, 1972, I served copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT on the United States and on the several parties thereto as follows:

1. On the United States by mailing 3 copies thereof in a duly addressed envelope, with air mail postage prepaid to The Solicitor General, Department of Justice, Washington, D. C. 20530;

2. On the Secretary of Labor by mailing 3 copies in a duly addressed envelope with air mail postage prepaid to Richard F. Schubert, Solicitor of Labor, U. S. Department of Labor, Washington, D. C. 20210;

3. On the Coleman plaintiffs, by mailing 3 copies in a duly addressed envelope with first class postage prepaid to H. Hayden Rector, Esquire, 324 International Trade Center, Mobile, Alabama 36602.

Willis C. Darby, Jr.
Attorney for Jiffy June
Farms, Inc., Jiffy Poultry,
Inc., and Robert A.
Trainor, Jr., defendants-
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APPENDIX A

PART I
Pertinent Statutory Provisions

Department of Transportation Act of 1966, (49 USC 1651 et seq.):

> Section 6 (e) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Interstate Commerce Commission, and of the Chairman, members, officers and offices thereof, under —
>
> * * * *
>
> (6) the following provisions of the Interstate Commerce Act, as amended —
>
> * * * *
>
> (C) relating to qualifications and maximum hours of service of employees and safety of operations and equipment: Sections 204 (a) (i) and (2), to the extent that they relate to qualifications and maximum hours of service of employees and safety of operation and equipment; and Sections 204 (a) (3), (3a), and (5).

Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 *et seq.*):

SEC. 7(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

SEC. 13(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the [Interstate Commerce Commission] has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *.

* * * *

SEC. 15(a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person —

* * * *

(2) to violate any of the provisions of section 6 or section 7, * * *;

* * * *

SEC. 16(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection.

* * * *

SEC. 17 The district courts *** shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a) (2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).

Motor Carrier Act of 1935, as amended (c. 498, 49 Stat. 543, 49 U.S.C. 301 *et seq.*).

SEC. 203. (a) As used in this part —

* * * *

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water: * * *.

* * * *

SEC. 204. (a) It shall be the duty of the Commission —

* * * *

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 204(d) and (e); 205, 220, 221, 222(a), (b), (d), (f) and (g); and 224.

* * * *

Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U.S.C. 251 *et seq.*), as amended by section 601 of the Fair Labor Standards Amendments of 1966, 80 Stat. 830.

SEC. 6. *Statute of Limitations.* — Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act —

(a) if the cause of action accrues on or after the date of the enactment of this Act — may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced

within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

* * * *

PART II
Pertinent Regulations

Motor Carrier Safety Regulations, 1971, (49 C.F.R. Parts 390-397)

§ 390.32 Whenever in Parts 390-397 of this subchapter a duty is prescribed for a driver or a prohibition is imposed upon him, it shall be the duty of the motor carrier to require observance of such prescription or prohibition; and, if the motor carrier is himself a driver, he shall likewise be bound thereby.

§ 390.33 Parts 390-397 of this subchapter shall be applicable to common carriers, contract carriers, and private carriers subject to the Department of Transportation Act (49 U.S.C. 1651 et seq.) as shown in the following table:

	Applicable parts of regulations						
	391	392	393	394	395	396	397
A. Vehicles and drivers used wholly within a municipality or the commercial zone thereof as defined by the Interstate Commerce Commission:							
1. When transporting explosives or other dangerous articles of such type and in such quantity as to require the vehicle to be specially marked or placarded under the Hazardous Materials Regulations, 49 C F R 177.823, or when operating without cargo under conditions which require the vehicle to be so marked or placarded under the cited regulations, except that until further order of the Federal Highway Administration § 390.33(A)(1) shall be governed by the quantity provisions of § 177.823 which were in effect prior to January 1, 1967, i.e., when transporting 2,500 pounds or more gross weight of one dangerous article or 5,000 pounds or more gross weight of two or more such items	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2. When operating under such conditions that special marking or placarding is not required under the regulations cited in paragraph A-1 of this table	No	No	No	Yes	Yes	No	No
B. Vehicles and drivers used beyond a municipality or the commercial zone thereof as defined by the Interstate Commerce Commission:							
1. When transporting explosives or other dangerous articles	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2. When not transporting explosives or other dangerous articles.	Yes	Yes	Yes	Yes	Yes	Yes	No

NOTE: The operations outlined in A and B above, include the transportation and use of certain vehicles as specifically described in section 203(b) of the Interstate Commerce Act, which include, generally, the following: (1) School buses; (2) taxicabs; (3) hotel buses; (4) motor vehicles under control of the Secretary of the Interior; (5) motor vehicles of agricultural cooperative associations; (6) motor vehicles used exclusively in carrying ordinary livestock, fish or agricultural commodities; (7) motor vehicles used exclusively in distribution of newspapers; (7a) transportation incidental to transportation by aircraft; (8) transportation wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of such municipality or municipalities; (9) the casual, occasional, or reciprocal transportation of passengers (when arranged for by brokers or other persons for compensation) and of property consisting of explosives or other dangerous articles by motor vehicle, except that Part 395 is applicable to all casual, occasional, or reciprocal transportation by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business.

The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any com-

mercial enterprise. (Section 203(a) (17) of the Interstate Commerce Act.) Except as otherwise specifically provided motor vehicles controlled and operated by any farmer when used in the transportation of agricultural commodities and products thereof from his farm, or in the transportation of supplies to his farm, are subject to the same regulations as those applicable to private carriers of property.

§ 395.3 (a) Except as provided in paragraphs (c) and (e) of this section and in § 395.10, no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive more than 10 hours following 8 consecutive hours off duty or drive for any period after having been on duty 15 hours following 8 consecutive hours off duty: *Provided, however,* That drivers using sleeper-berth equipment, or off duty at a natural gas or oil well location, may cumulate the aforementioned total of at least 8 hours off duty in two periods of at least 2 hours each, resting in a sleeper berth, as defined in § 395.2(g), or resting while off duty in other sleeping accommodations at a natural gas or oil well location.

(b) Except as provided in paragraph (e) of this section, no motor carrier shall permit or require any driver used by it to be on duty, nor shall any such driver be on duty, more than 60 hours in any 7 consecutive days as defined in § 395.2(c) regardless of the number of motor carriers using the driver's services. *Provided, however,* That carriers operating vehicles every day in the week may permit drivers to remain on duty for a total of not more than 70 hours in any period

of 8 consecutive days. *Provided further, however,* That the limitations of this paragraph shall not apply with respect to any driver-salesman whose total driving time does not exceed 40 hours in any 7 consecutive days.

(c) The provisions of paragraph (a) of this section shall not apply with respect to drivers used wholly in driving motor vehicles having not more than 2 axles and whose gross weight, as defined in § 390.10, does not exceed 10,000 pounds, unless such vehicle is used to transport passengers or explosives or other dangerous articles of such type and in such quantity as to require the vehicle to be specifically marked or placarded under the Hazardous Materials Regulations, § 177.823 of this Title, or when operated without cargo under conditions which require the vehicle to be so marked or placarded under the cited regulations: *Provided further, however,* That this section shall not apply with respect to drivers of motor vehicles engaged solely in making deliveries for retail stores during the period from December 10 to December 25, both inclusive, of each year.

(d) In the instance of drivers of motor vehicles used exclusively in the transportation of oilfield equipment, including the stringing and picking up of pipe used in pipelines, and servicing of the field operations of the natural gas and oil industry, any period of 8 consecutive days may end with the beginning of any off-duty period of 24 or more successive hours.

(e) In the instance of a driver who drives motor vehicles solely within the State of Alaska such driver may be permitted to drive not more than 15 hours following 8 consecutive hours off duty and may not be permitted to drive after having been on duty 20 hours following 8 consecutive hours off duty. Such driver shall not be on duty more than 70 hours in any period of 7 consecutive days: *Provided,* That carriers operating every day in a week may permit drivers to remain on duty for a total of not more than 80 hours in any period of 8 consecutive days.

§ 395.8 (t) *Driver's log, when not required.* The requirements of this section shall not apply: (1) To any regularly employed driver who drives wholly within a radius of 50 miles of the garage or terminal at which he reports for work: *Provided,* That the motor carrier employing such driver maintains and retains for period of 1 year accurate and true records showing the total number of hours the driver is on duty per day and the time at which the driver reports for and is released from duty each day; or (2) to drivers of motor vehicles having not more than 2 axles and whose gross weight, as defined in § 390.10, does not exceed 10,000 pounds, unless such vehicle is used to transport passengers or explosives or other dangerous articles of such type and in quantity as to require the vehicle to be specifically marked or placarded under the Hazardous Materials Regulations, § 177.823 of this Title, or when operated without cargo under conditions which require the vehicle to be so marked or placarded under the cited regulations.

APPENDIX B

PART I
Opinion And Judgment Of The Trial Court

Arthur COLEMAN et al., Plaintiffs,
v.
JIFFY JUNE FARMS, INC., et al.,
Defendants.

George P. SHULTZ, etc., Plaintiffs,
v.
JIFFY JUNE FARMS, INC., et al.,
Defendants.

Civ. A. Nos. 5337-69-P, 5342-69-P.
United States District Court,
S. D. Alabama, S. D.
Dec. 28, 1970.

OPINION AND ORDER
FINDINGS OF FACT

PITTMAN, District Judge.

This is a consolidation of actions, in one case by employees and former employees of the defendants, and in the other case, by the Department of Labor, each seeking overtime pay allegedly due for past services, and an injunction against future violation of Title 29 U.S.C.A. Section 207(a) (1). There is no issue presented with reference to the number of hours, the rates of pay, or that all persons claimed to be due overtime were employees of defendants during the relevant periods of time. The parties have informed the court that

they can agree on the amount of overtime due should the court hold that any employees are entitled to overtime pay. The plaintiffs, Coleman, et al., have raised the additional question of liquidated damages and a reasonable attorney's fee. The issue before the court is whether or not the defendants, or either of them, are exempted from the provisions of the Fair Labor Standards Act by virtue of Title 29 U.S.C.A. Section 213(b) (1).

Defendants, in their pretrial response, incorporated within the court's pretrial order, have admitted that defendants, Jiffy June Farms, Inc. and Jiffy Poultry, Inc., are corporations having a place of business in Mobile County, Alabama, and the defendant, Robert A. Trainor, Jr., resides in Mobile County, Alabama. All are within the Southern District of Alabama. The defendants have continuously, since September 1, 1966, engaged in ordering, receiving, processing, delivering, performing related clerical functions, and otherwise handling or working on poultry, eggs and oysters that have been moved in, or produced for, commerce.

At the trial of the case, plaintiffs offered the answers to requests for admissions and the interrogatories propounded by the plaintiffs, the answers thereto by the defendants, and rested. The defendants established that Jiffy June Farms, Inc. is a processing establishment whose principal business is processing chickens, turkeys and eggs. All Jiffy June Farms' sales of finished produce are made to the defendant Jiffy Poultry, Inc. Offal and wastes are sold elsewhere.

Jiffy Poultry, Inc. is a sales and distributing concern. In addition to selling and distributing products of Jiffy June Farms, they make additional purchases from other processors and sell and deliver those products. The ownership of both corporate defendants is substantially the same. The period of time relevant to this suit is April, 1966 to April, 1969 for those employees who have severed their employment with the defendants, and from April, 1966 to the present for those who have continued to be employed by the defendants.

All the processing by the defendant Jiffy June Farms is done in Alabama. The majority of the sales and deliveries by the defendant Jiffy Poultry are made in Alabama. However, during April, 1966, and until April, 1969, the defendant Jiffy Poultry regularly, sometimes two or three times a week, and in most weeks of each month, made small sales and deliveries to South Flomaton, Florida, a rural community on the Alabama-Florida line.

On those deliveries which included the Florida deliveries, the truck usually had deliveries in Alabama before reaching Florida, and/or deliveries again in Alabama after reaching Florida. On occasion, a truck might take a full load to Florida, but, generally, the delivery was a small portion of a truckload. From the evidence, it appears that all, or substantially all, deliveries in the State of Florida were made to South Flomaton, Florida. The deliveries in Florida constitute .23% of all deliveries in the course of defendants' business. It should be noted at this time that defendant employs 67 driver-loaders among whom this infinitesimal interstate traffic is allegedly divided.

The 67 drivers for Jiffy Poultry also served as loaders. All drivers participated in the loading of all trucks. While a particular driver might be ordered to drive a particular truck, that same driver would have assisted in the loading of other trucks. Jiffy Poultry employed no full-time loaders without driving duties. The usual procedure was for invoices representing a load for a particular truck to be given to a driver who would arrange the invoices in a reverse order of consecutive deliveries. The trucks would be loaded with poultry being loaded from the back forward. If the load was mixed, eggs would be loaded to the rear of the truck. The loading was done in such a manner as to minimize shifting and harmful effects on the produce.

The defendant did not operate regular daily or weekly route deliveries, but routes would be organized to minimize travel and according to the most economical make-up of truck loads as dictated by the flow of sales orders. Over a period of time customer orders developed in such a manner that a pattern was discernable. However, no regular truck routes such as those operated by buses or trains were established. The drivers were not assigned a particular truck, nor to particular routes, but would receive their truck and route assignment on the day the trucks left Jiffy Poultry.

Both defendants made out-of-state purchases, but deliveries to Alabama from other states were made by other carriers. Jiffy June Farms purchased fiberboard boxes from International Paper Company which they shipped from South Carolina and Florida to a warehouse in Mobile, Alabama. At that point the defend-

ants' drivers would pick up the boxes and deliver them to the defendants.

The defendant Jiffy Poultry purchased chickens and turkeys from out-of-state. These were delivered by the sellers, in most instances, to cold storage facilities leased by Jiffy Poultry at the Alabama State Docks. On occasion, Jiffy Poultry would also deliver other products for storage in these facilities, and would pick up products stored there for delivery to other places. Jiffy Poultry has made regular, dockside sales to ships in Mobile for use aboard ship while at sea, and, possibly, for delivery in foreign countries. The evidence is insufficient to determine the quantities of these commodities.

The defendants' employees in 1966, and for the period of time in question, voted in a proper election to be represented by a union. Subsequently, during bargaining with the defendants, the union representative expressed the opinion to the defendants that the employees in question, truck drivers, were not within Section 207(a) (1) of the Fair Labor Standards Act (FLSA) requiring overtime pay. The bargaining agreement (Defendants' Exhibit 10) provided that these employees were not to receive overtime. Thereafter, the employee-union members became dissatisfied with their failure to receive overtime pay. A grievance hearing was had, and it was agreed with the defendants that senior employees would be given all time possible over forty hours per week in order to increase their earnings.

Some of the employees were still dissatisfied and took their problems to the Department of Labor. The

Department found that some employees were exempt and some were not. The Department of Labor was put on notice by these employees on or shortly before June, 1967. These two suits were filed in January, 1969. The defendants have raised the defense of laches to the Department's suit. The plaintiffs, in rebuttal, called one of the plaintiffs, Arthur Coleman, as a witness. Coleman's testimony was, in substance, similar to that offered by the defendants except that his testimony tended to indicate greater regularity in the various routes operated by the defendants.

CONCLUSIONS OF LAW

There is no dispute as to the applicable law except as to its pertinency to the facts in the case at bar. Jiffy Poultry, Inc. admits that it employed the employees for whom overtime compensation is sought, and that each employee was subject to the Fair Labor Standards Act. Jiffy Poultry contends, however, that each employee for whom overtime compensation is sought is exempt from the overtime provisions of FLSA.

> "Under the Motor Carriers Act of 1935 the Interstate Commerce Commission was accorded the power to 'establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment' of common carriers by motor vehicle. 49 U.S.C.A. § 304(a)(1)[1]

[1]These functions of the I.C.C. were transferred to the Secretary of Transportation. Title 49 U.S.C.A. 1655(e) (6) (C).

Three years later, when the Fair Labor Standards Act (FLSA) was adopted, Congress expressly provided that overtime provisions of the Act[2]

> 'shall not apply with respect to * * * any employee with respect to whom the Interstate Commerce Commission (now the Secretary of Transportation) has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49' 29 U.S.C.A. § 213(b)(1) (1965).

In defining the interrelation between these statutory provisions, the Supreme Court has held that only those employees who were engaged in work which may affect the safety of the operation of motor vehicles were subject to the I.C.C.'s jurisdiction, and, consequently, with respect to them, their employees were exempt from the overtime requirements of the FLSA. United States v. American Trucking Associations, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940)" Blankenship v. Thurston Motor Lines, Inc., 415 F.2d 1193, 1195 (4th Cir. 1969).

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[2]The pertinent section of the FLSA is 29 U.S.C.A. § 207(a)(1): 'Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.'

"The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' * * * Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 65 S.Ct. 807, 89 L.Ed. 1095, 1098 (1945). (Citation omitted.)

The employer's burden of proof must be met by a clear and unmistakable showing of (the operative facts constituting an exemption) within the letter and the spirit of the act. A. H. Phillips, Inc. v. Walling, supra; Pugh v. Lindsay, 206 F.2d 43 (4th Cir. 1953).

The threshold question in this litigation is whether or not the driving and loading activities of the plaintiffs are subject to regulatory power of the I.C.C. For it is the existence of such power, whether or not it is exercised, which governs the section 12(b)(1) exemption. Morris v. McComb, 332 U.S. 422, 68 S.Ct. 131, 92 L.Ed. 44, 54 (1947). The I.C.C.'s jurisdiction over safety of operations is not determined by considerations as to whether the fraction of the employee's time devoted to safety-affecting work is substantial. Rather, it is the character of the employee's activities

that determines the actual need for I.C.C. regulation. Levinson v. Spector Motor Service, 330 U.S. 649, 674, 67 S.Ct. 931, 91 L.Ed. 1158 (1946); Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, 67 S.Ct. 954, 91 L.Ed. 1184 (1946). In *Levinson*, supra, the Supreme Court quotes from Levinson v. Spector Motor Service, 323 Ill. App. 505, 56 N.E.2d 142 (1944). The quoted portion appears in a footnote at page 656 of 330 U.S., at page 935 of 67 S.Ct., and reads in part as follows:

> "* * * 'Considering the purpose of the Motor Carriers Act we believe that the true determinant is whether an employee performs *any* duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial.' While it is true that many of the cases continue to speak of a 'substantial part' or 'substantial portion' when they are viewed as an entirety it is apparent that the activities must properly be tested as to what they accomplish rather than how much time they may consume." Yellow Transit Freight Lines, Inc. v. Balven, 8 Cir., 320 F.2d 495, 498-499 (1963).

Another early Supreme Court decision, Morris v. McComb, 332 U.S. 422, 68 S.Ct. 131, 92 L.Ed. 44 (1947) held that the I.C.C. had the power to establish qualifications and maximum hours of service with respect to all drivers and mechanics employed by a general cartage concern doing business entirely within the State of Michigan. The Court found that 3.65% of the total trips were in interstate commerce, in the normal course of the business, distributed generally through-

out the year and performed indiscriminately by the firm's 43 drivers along with their intrastate services. While *Morris* bears an appealing factual resemblance to the case sub judice, the decision in *Morris* is not here considered to be compelling. Despite numerous similarities, there are crucial factual distinctions in the cases. A firm in general cartage holds itself out to the public as being prepared to transport freight anywhere and at any time. The percentage of its business having an interstate nature is not finally determinative because it is subject to fluctuation as an incident of which certain of the firm's activities may, at a given time, bear a very substantial relationship to interstate commerce. Even as such a firm's interstate activities might periodically ebb, the potential remains, and should be regulated.

The defendant, Jiffy Poultry, is involved in cartage — as a private carrier — only as an incident of their poultry processing business. Defendants' reliance on Kerr v. Jeans, 193 F.2d 572 (5th Cir. 1952) is not to be ignored. In its decision, the Fifth Circuit applied *Morris* to a private carrier. However, the claim in Kerr v. Jeans was for overtime compensation for weeks during which the employee was not engaged in any interstate activity. In other weeks, however, he was substantially involved. In the case sub judice, the defendants' involvement in interstate cartage is both static and minimal. When measured by revenues, as was done in *Morris*, the deliveries in Florida constitute .23% of all deliveries in the course of defendant, Jiffy Poultry's, business. It should be noted at this time that defendant, Jiffy Poultry, employs 67 driver-loaders among whom this infinitesimal interstate traffic is al-

legedly divided. Assuming, arguendo, that the interstate work is so divided, each driver would spend .00343% of his time in interstate commerce. Yet, it is not the amount of time spent, but the substantiality of the effect of these efforts which we are to measure. Levinson v. Spector Motor Service, supra. Courts have, on previous occasions, looked to the safety-affecting aspects of other employment, and in Foremost Dairies Inc. v. Ivey, 204 F.2d 186 (5th Cir. 1953), found that seven of eight plaintiffs who were employed in commerce and periodically called upon to load trucks in interstate commerce, were not proven to have been substantially involved in safety-affecting operations. The eighth plaintiff was held to have been within the I.C.C.'s jurisdiction because of the discretion exercised in his supervision of the loading. In Wirtz v. C. and P. Shoe Corporation, 336 F.2d 21 (5th Cir. 1964), employees primarily occupied in other work, who intermittently helped as truck drivers came within the *de minimis* rule of Pyramid Motor Freight Corp. v. Ispass, supra, and recovery was allowed. In Opelika Royal Crown Bottling Co. v. Goldberg, 299 F.2d 37 (5th Cir. 1962), an employee primarily occupied within the warehouse, who was called upon sporadically to assist with loading of soft drink delivery trucks came within the *de minimis* rule. Looking beyond the minimal time involved in the Florida deliveries by Jiffy Poultry, Inc. to the safety-affecting aspects, these, because of the light weight loads, are also minimal, as are the trips themselves, involving as they do, deliveries to a community located on the Alabama-Florida border.

Although the *de minimis* cases cited hereinabove rely, in their holdings, upon the fact that the affected employees were reassigned from other types of work for the performance of their occasional and minimal efforts affecting safety of interstate commerce, the businesses in these cases were engaged to a substantial degree, in interstate commerce; and so, consequently were their regular drivers and loaders. In the case at bar the employees are regular, full-time drivers and loaders engaged in intrastate deliveries. Their occasional and minimal involvements with interstate commerce are not rendered more substantial because of their experience in this work or because reassignment was unnecessary.

In addition to their Florida deliveries, defendants allege other interstate activities, to wit:

(A) Loading poultry products to be taken to Florida.
(B) Loading offal to be taken to Mississippi in the trucks of another firm.
(C) Trips to warehouse to pick up frozen poultry shipped from out of state.
(D) Trips to warehouse to pick up boxes and marked cartons shipped from out of state.
(E) Sales to ships and ship chandlers at the docks.
(F) Trips to the Mobile Farmers' Market to guide out-of-state trucks to the Jiffy Poultry plant.

The court finds the loading operations conducted by the defendants are not of a safety-affecting nature,

and require no discretion on the part of the loader. The loading of poultry for delivery was done on a first in — last out basis, and with regard to safety in only a most general way. Yellow Transit Freight Lines, Inc. v. Balven, 320 F.2d 495, 499 (8th Cir. 1963). Also, with regard to the loading of offal, there is little room for the exercise of discretion. Foremost Dairies, Inc. v. Ivey, supra; Pyramid Motor Freight Corp. v. Ispass, supra.

The defendant did not transport these commodities interstate, however, defendant relies upon Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460 (1943); Opelika Royal Crown Bottling Company v. Goldberg, supra; Shew v. Southland Corporation, 370 F.2d 376 (5th Cir. 1966); and Galbreath v. Gulf Oil Corporation, 413 F.2d 941 (5th Cir. 1969), to support its allegations that the trips to the warehouses were in interstate commerce. The court is not persuaded that such reliance is well placed. The cases cited involve further distribution from a central receiving point. In the case sub judice, the shipments were directed to Jiffy Poultry, were the property of Jiffy Poultry, and were placed in warehouse space leased to Jiffy Poultry. It is difficult to deny that these products had reached their destination, and to assert that mere transferral among Jiffy Poultry's facilities in Alabama is a continuation of interstate commerce.

While the deliveries by defendant to ships and ship chandlers appear to be in interstate commerce, and therefore must be added to the .23% of defendant's business which is of an interstate nature, there is no satisfactory evidence to indicate how substantial these

maritime sales might be. It is also possible that the "guided tours" from the Farmers' Market to Jiffy Poultry's plant might affect safety in what is assuredly interstate commerce. However, these activities might be found to be *de minimis*. Again, there is a lack of sufficient evidence to substantiate the extent and the safety-affecting nature of the work of these guides.

It is well settled in the law that section 13 exemptions are to be narrowly construed, and the burden of proof falls to the claimant of the exemption.

> "Any exemption for such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard for the plain meaning of the statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." A. H. Phillips, Inc. v. Walling, supra, 65 S. Ct. at 808, 89 L.Ed. at 1098; Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 80 S.Ct. 453, 4 L.Ed.2d 393, 396 (1961); Gatlin v. Mitchell, 287 F.2d 76 (5th Cir. 1961).

In light of the strict construction accorded section 13 of FLSA, the court does not feel constrained to allow an exemption which would deprive 67 working men of overtime compensation on the basis of a minimum of evidence of interstate activity which is minimal in its scope and minimal in its nature.

In Civil Action No. 5337-69, Arthur Coleman et al. v. Jiffy June Farms, Inc., et al., the plaintiffs seek liquidated damages. The court is satisfied that the act or omission giving rise to the defendants' action was in good faith and he had reasonable grounds for believing that his acts or omissions were not in violation of the Fair Labor Standards Act of 1938, as amended, therefore, liquidated damages are denied.

In the same case, attorney fees have been requested. The question of attorney fees is left open for the attorneys for said parties to present to the court evidence as to a reasonable attorney fee, which should be done on or before February 15, 1971.

In Civil Action No. 5342-69, George P. Shultz, etc. v. Jiffy June Farms, Inc., et al., injunctive relief is sought which is granted and attached to this order and made a part hereof.

The parties have informed the court that if a decree is rendered against the defendants they will be able to reach an agreement as to the amount due defendants' employees in each of the cases. It is therefore,

Ordered, adjudged, and decreed that the court finds for the plaintiffs and against the defendants in each of the respective cases, and the parties are to file with the court an agreed judgment as to the amounts due on or before February 15, 1971.

Costs are taxed against the defendants.

INJUNCTION

The defendants are hereby enjoined and restrained as follows:

(1) From withholding the payment of back pay found to be due by this court for the defendants' employees for three years prior to the commencement of this cause as authorized by section 17 of the Fair Labor Standards Act of 1938 as amended 29 U.S.C. § 201 *et seq.*, and section 6 of the Portal to Portal Act of 1947 as amended 29 U.S.C. § 255, and

(2) From violating the provisions of section 15(a)(2) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*

PART II

Opinion And Judgment Of The Court Of Appeals, Including Denial Of The Petition For Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1412
Summary Calendar*

ARTHUR COLEMAN, ET AL,
Plaintiffs-Appellees,
versus

JIFFY JUNE FARMS, INC., ET AL,
Defendants-Appellants.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,
versus

JIFFY JUNE FARMS, INC., ET AL,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Alabama.

(November 29, 1971)

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

Before WISDOM, COLEMAN, and SIMPSON,
Circuit Judges.

WISDOM, Circuit Judge: The decision of the district court is AFFIRMED. A detailed statement of the Court's reasons for affirmance would serve no precedential value, see Local Rule 21,[1] except insofar as the decision interprets the three-year statute of limitations for the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 255, as amended in 1966.

Section 255 provides, in pertinent part, that every action for unpaid overtime compensation under the FLSA "shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a wilful violation may be commenced within three years after the cause of action accrued." In this action to recover unpaid overtime compensation, the district court held that the employer's refusal to pay overtime compensation was "wilful", even though the court also found that "the act or omission giving rise to the defendants' action was in good faith and he had reasonable grounds for believing that his actions or omissions were not in violation [of the FLSA]." The court therefore permitted the employees to recover their unpaid wages for three years back.

Before August 1966 the loaders and drivers employed by Jiffy June Farmers were paid overtime compensation in accordance with Section 7 of the FLSA. Then

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[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

the Teamsters' Union organized the Jiffy June employees. The union negotiated a collective bargaining agreement with the Jiffy June management which granted an increase in the regular hourly wage, and in exchange the union agreed to a provision purportedly exempting the employees from the FLSA overtime rate because they were subject to the jurisdiction of the Interstate Commerce Commission.[2] Before entering into the agreement Robert A. Trainor, Jr., the principal shareholder of Jiffy June, had consulted his attorney, who advised him that the Jiffy June loaders and drivers would be exempt under the applicable provision of the FLSA.

So far as we have been able to discover, no appellate court has construed the statute of limitations since it was amended in 1966. Three district court decisions — two from this Circuit — have applied the three year period upon a finding of wilfulness. But the district court cases provide little guidance as to the applicable period of limitations when the employer seeks and then relies on the advice of counsel prior to departing from the federal wage standard by signing a collective bargaining agreement.

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[2]Section 13(b)(1) of the FLSA provides that the overtime provisions of the Act shall not be applicable to "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act. 1935." 29 U.S.C. § 213(b)(1).

Under Local Rule 21, we have today affirmed the district court's holding that Jiffy June's drivers and loaders were not exempt from the coverage of the FLSA by virtue of Section 13(b)(1).

In *Hodgson v. Hyatt*, D.C. Fla. 1970, 318 F. Supp. 390, the employer altered his records of hours worked to reflect falsely that his employees had been paid the statutory rate for overtime work. The district court applied the three year statute "to violations which are intentional, knowing, or voluntary as distinguished from accidental, and . . . [characterized by] conduct marked by careless disregard whether or not one has the right so to act." In *Hyatt*, the employer's alteration of his records demonstrated beyond any doubt that he knew of the applicability of the FLSA and intended to violate the Act. *Hyatt* therefore does nothing to resolve our problem here, namely, whether some lesser degree of knowledge may lead to a wilful violation of the Act. See also *Krumbeck v. John Oster Mfg. Co.*, D.C. Wisc. 1970, 313 F. Supp. 257, where the court found that the employer had changed his job classifications "for the purpose of eluding the requirements of the Equal Pay Act." 313 F. Supp. at 264.

In *Dowd v. Blackstone Cleaners Inc.*, D.C. Tex. 1969, 306 F. Supp. 1276, 1281, the district court applied substantially the same "intentional, knowing, or voluntary" test of wilfulness used in *Hyatt*, and found a wilful violation where the employees had refrained from punching a time clock when they worked overtime (on the weekends) and only then. The Court deduced that the employees had been ordered not to punch the clock, and that the employer had therefore sought to evade the FLSA. Thus *Dowd*, like *Hyatt* and *Krumbeck*, involved bad faith evasion of the Act and definite knowledge of its applicability. In *Dowd*, the defendant testified that he had made casual inquiries and been told that the Act did not apply to his employees. The court

noted that the defendant did not consult "a lawyer or the Labor Department or an expert of any kind to verify this determination," and adhered to its view that the defendant knew his actions constituted a violation of the Act. *Dowd*, then, may imply in dictum that consultation with counsel is sufficient to negate wilfulness and avoid the three year statute of limitations, but it stops far short of any such holding.

In short, none of the three district court cases has addressed itself directly to the question — whether a violation committed in good faith may yet be wilful, as the Government and the plaintiffs argue here. Even though Trainor consulted his lawyers, and evidently relied on legal advice, we agree with the district court that Trainor's decision to change Jiffy June's rate of pay was "wilful" within the meaning of that term as used in the 1966 amendment of § 255. Trainor decided to consent to the change in rates of pay for overtime work despite his awareness that the FLSA might prevent such a change. He had previously paid his employees the federal overtime rate; and Trainor's decision to request an opinion of counsel is further evidence that he did not stop paying the statutory overtime without any inkling that the federal wage scheme might thereby be violated. We cannot excuse Trainor from these suspicions simply because his lawyer told him that he need not fear federal overruling of his new agreement with Teamsters'. The advice of counsel to proceed with a favorable wage settlement which undercuts the FLSA would be an easy way of circumventing the requirements of the Act — far too easy a way for us to assume that Congress intended to subject employees to the strict two-year limitations per-

iod whenever an employer's lawyer had given him the green light to restructure their pay.

The entire legislative history of the 1966 amendments of the FLSA indicates a liberalizing intention on the part of Congress. Requiring employers to have more than awareness of the possible applicability of the FLSA would be inconsistent with that intent. Consequently, we hold that employer's decision to change his employees rate of pay in violation of FLSA is "wilful" when, as in this case, there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture? In this case, Trainor knew that the FLSA had to be considered when he ceased to comply with the Act and asked his lawyer if it was permissible to do so. We need not consider today whether the three-year statute of limitations applies in a case where the employer ought to have known of the possible applicability of the FLSA but can demonstrate compellingly that in fact he did not.

The decision below is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-1412
Summary Calendar

D. C. Docket Nos. 5337 & 5342-69

ARTHUR COLEMAN, ET AL,
Plaintiffs-Appellees,

versus

JIFFY JUNE FARMS, INC., ET AL,
Defendants-Appellants.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

versus

JIFFY JUNE FARMS, INC., ET AL,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Alabama

Before WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, James D. Hodgson, etc., the costs on appeal to be taxed by the Clerk of this Court.

November 29, 1971

Issued As Mandate: May 25, 1972

CORRECTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1412

ARTHUR COLEMAN, ET AL,
Plaintiffs-Appellees,
versus

JIFFY JUNE FARMS, INC., ET AL,
Defendants-Appellants,

* * * *

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,
versus

JIFFY JUNE FARMS, INC., ET AL,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Alabama

ON PETITION FOR REHEARING

(May 17, 1972)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM: 1. We adhere to the construction of Section 255 of the Fair Labor Standards Act embodied in the panel opinion of November 29, 1971. Even under the criminal provision of the Act, section 216 (a), a "wilful" act has been interpreted to mean no more than one "deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally, or by ordinary negligence'. *Nabob Oil Co. v. United States*, 10 Cir. 1951, 190 F.2d 478, 480. Out of caution, however, we note that our interpretation of the word "wilful" as used in Section 255 was not intended to apply to Section 216(a). Our decision is limited to the particular facts of this case and to the question before us: civil liability under the Fair Labor Standards Act.

2. In a supplemental petition for rehearing, the appellants state that "[n]either this court nor the district court specifically addressed itself to the separate and distinct defense of Jiffy Farms, Jiffy Poultry, and Trainor; namely

> on the 18th day of August, 1966, defendant Jiffy Farms and defendant Jiffy Poultry entered into a collective bargaining agreement with Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 991 (Teamsters), certified by the National Labor Relations Board ... as the exclusive collective bargaining agent of the employees referred to in paragraph five of the complaint; said collective

bargaining agreement contains a "final and binding" grievance and arbitration procedure; and, that prior to the filing of this action, it was finally determined through such grievance procedure that the employees referred to in paragraph five of the complaint were exempt from Section 7 of the Act, 29 U.S.C.A. 207, by virtue of Section 13(b) (1) of the Act, 29 U.S.C.A. 213(b) (1).

The appellants argue that their employees should be bound by their decision to process their claims for overtime wages through the grievance machinery of the collective bargaining agreement. In support of their contention that this issue is an important one, the appellants cite *Iowa Beef Packers, Inc. v. Thompson*, 40 U.S.L.W. 4239 (Feb. 29, 1972) where, after oral argument, the Supreme Court dismissed as improvidently granted a writ of certiorari to consider "whether ... employees may sue in court to recover overtime allegedly withheld in violation of the Fair Labor Standards Act, if their grievance of alleged statutory violation is also subject to resolution under grievance and arbitration provisions of a collective bargaining agreement". Certiorari was dismissed because "the grievance and arbitration provisions . . . of the collective-bargaining agreement involved in this case ... apply only to grievances 'pertaining to a violation of the Agreement.' "

It is not at all clear from the record in the present case whether it was "finally determined" through the contractual grievance procedure that the appellants' employees were exempt from the overtime provisions

of the FLSA. Nor is it clear just which, if any, of the appellees were parties to the grievance. We do not address these uncertainties because we are convinced that appellants' argument is without merit, even assuming that all the aggrieved employees fully, and unsuccessfully pursued grievance procedures in an effort to secure vindication of their statutory right to overtime pay. We need not reach the question for which certiorari was originally granted in *Iowa Beef Packers, supra.*

The collective bargaining agreement between the Teamsters and the appellants defines a grievance as a "complaint by an employee or the Union concerning the interpretation or application of this agreement". Article V, Section 1. The overtime dispute is covered by this relatively restrictive language because the collective bargaining agreement further provides that its overtime provisions "shall not apply to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49 United States Code".

On its face, this contractual provision appears to cast us directly upon the problem of the *Iowa Beef Packers* case, supra. We should certainly face a serious question of the need for arbitration if union and management had agreed by contract to state management's obligation to pay overtime in terms of management's statutory obligation under the Fair Labor Standards Act. There could be some confidence in the legitimacy of arbitration under such circumstances, for union and management would each actively pursue differing

views of the uncertain requirements imposed by the contract. The union would be required to make a good faith effort on behalf of the aggrieved employees, and management would, of course, be guided by its own interests.

The record in the present case, however, plainly reveals that the disputed provision in the Jiffy June collective agreement was not a provision to which management and union attached differing interpretations. As Jiffy June openly states in its brief at page 31, "The motor carrier exemption was suggested by the Teamsters. Through collective bargaining the truck drivers and loaders obtained a raise; the Teamsters, as the truck drivers' representative, recognized an overtime exemption". In truth, then, Article XII, Section 3 of the agreement, though ostensibly ambiguous and susceptible of interpretation through the grievance machinery, embodied an unequivocal understanding between Teamsters and Jiffy June's management. The understanding was that truck drivers and loaders were not to be paid overtime.

"Settling" the employees' grievances through the contractual grievance machinery was, under the circumstances of this case, a hopeless charade. Its mind made up and its credibility committed, the union could not possibly provide the aggrieved employees with the fair and vigorous representation to which they were entitled in attempting to vindicate their statutory claim for overtime wages. If employees not fairly represented may sue in federal court to enforce contractual rights, it follows a fortiori that employees not fairly represented may sue, without regard to griev-

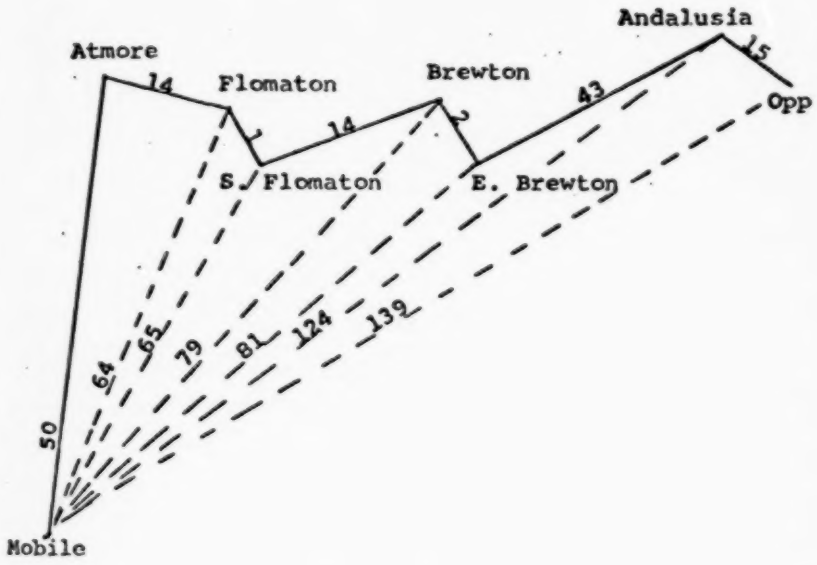
ance procedures, to enforce the detailed rights given them by Congress when it enacted the Fair Labor Standards Act. See *Vaca v. Sipes*, 1967, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842.

The petition for rehearing is DENIED.

APPENDIX C

PART I

Mileage Chart for Florida Deliveries



PAGE CUT OFF

Gulf of Mexico
Sims Chapel
McIntosh
Citronelle
Mt. Vernon
Gulf Crest
Chunchula
Creole
Semmes
Theodore
Saint Elmo
Bayou Gr. La Batre
Chrysler
Little River
McCullough
Calvert
Chastang
Stockton
Bay Minette
Whitehouse Forks
Stapleton
Bromley
Fairhope
Silverhill
Point Clear
Foley
Elberta
Roberts-dale
Josephine
Loxley
Barnwood
Uriah
Frisco City
Robinsonville
Canoe
Atmore
Byrneville
McDavid
Cottage Hill
Century
Flomaton
Jay
Brewton
Conecuh National Forest
Andalusia
Opp
Sanford
Brooklyn
Kirkland
Disonville
Mc Lellan
Whitfield
New York
Pine Barren
Molino
Wallace
Milton
Pace
Harold
Holt
Baker
Crestview
Garden City
Laurel Hill
Lockhart
Oteen
Campton
Dorcas
Valparaiso
Niceville
Eglin Air Force Reservation
Florala
Wynnehaven
Perdido Beach
Warrington
Ala.
Fla.
Escambia
Baldwin
Covington

PART II

Relative Possibility Of Driver Making Interstate Trip
September 9, 1966, Through January 29, 1969

Week Ending	# Drivers	Florida Deliveries	Poss. Of Fla. Trip	Trips To Finch Whse	Poss. Of F/W Trip	Total I/S Trips	Poss. Of I/S Trip
9/ 9/66	10	2	20.00%				
9/16/66	11	3	27.27%				
9/23/66	11	2	18.18%				
10/ 7/66	11	2	18.18%				
10/14/66	11	2	18.18%				
10/21/66	12	2	16.66%				
10/28/66	12	2	16.66%				
11/ 4/66	12	2	16.66%				
11/11/66	12	3	25.00%				
11/18/66	13	1	7.69%				
11/25/66	13	2	15.38%				
12/ 2/66	13	2	15.38%				
12/ 9/66	13	2	15.38%				
12/16/66	11	2	18.18%				
12/23/66	12	3	25.00%	1	8.33%	3	25.00%

Week Ending	# Drivers	Florida Deliveries	Poss. Of Fla. Trip	Trips To Finch Whse	Poss. Of F/W Trip	Total I/S Trips	Poss. Of I/S Trip
12/30/66	12	2	16.66%	2	16.66%	4	33.33%
1/ 4/67	17	1	5.88%	0		1	5.88%
1/11/67	17	2	11.76%	6	35.29%	8	47.05%
1/18/67	18	2	11.11%	4	22.22%	6	33.33%
1/25/67	20	3	15.00%	4	20.00%	7	35.00%
2/ 1/67	19	2	10.52%	0		2	10.52%
2/ 8/67	19	2	10.52%	1	5.26%	3	15.78%
2/15/67	17	2	11.76%	3	17.64%	5	29.41%
2/22/67	16	2	12.50%	2	12.50%	4	25.00%
3/ 1/67	18	2	11.11%	2	11.11%	4	22.22%
3/ 8/67	17	3	17.64%	1	5.88%	3	17.64%
3/15/67	16	2	12.50%	4	25.00%	6	37.50%
3/22/67	17	1	5.88%	2	11.76%	3	17.64%
3/29/67	17	3	17.64%	2	11.76%	5	29.41%
4/ 5/67	17	2	11.76%	2	11.76%	4	23.52%
4/12/67	18	2	11.11%	4	22.22%	6	33.33%
4/19/67	20	1	5.00%	1	5.00%	2	10.00%
4/26/67	20	2	10.00%	2	10.00%	4	20.00%
5/ 3/67	20	1	5.00%	3	15.00%	4	20.00%

Week Ending	# Drivers	Florida Deliveries	Poss. Of Fla. Trip	Trips To Finch Whse	Poss. Of F/W Trip	Total I/S Trips	Poss. Of I/S Trip
5/10/67	20	2	10.00%	1	5.00%	3	15.00%
5/17/67	19	2	10.52%	1	5.26%	3	15.78%
5/24/67	20	2	10.00%	4	20.00%	6	30.00%
5/31/67	20	4	20.00%	1	5.00%	5	25.00%
6/ 7/67	20	1	5.00%	1	5.00%	2	10.00%
6/14/67	21	2	9.52%	5	23.80%	7	33.33%
6/21/67	21	2	9.52%	1	4.76%	3	14.28%
6/28/67	21	2	9.52%	2	9.52%	4	19.04%
7/ 5/67	21	3	14.28%	2	9.52%	5	23.80%
7/12/67	21	2	9.52%	1	4.76%	3	14.28%
7/19/67	20	2	10.00%	3	15.00%	5	25.00%
7/26/67	19	2	10.52%	2	10.52%	4	21.05%
8/ 2/67	21	2	9.52%	1	4.76%	3	14.28%
8/ 9/67	19	2	10.52%	3	15.78%	5	26.31%
8/16/67	19	2	10.52%	3	15.78%	5	26.31%
8/23/67	20	2	10.00%	2	10.00%	4	20.00%
8/30/67	18	2	11.11%	4	22.22%	6	33.33%
9/ 6/67	18	2	11.11%	1	5.55%	3	16.66%
9/13/67	18	2	11.11%	2	11.11%	4	22.22%

Week Ending	# Drivers	Florida Deliveries	Poss. Of Fla. Trip	Trips To Finch Whse	Poss. Of F/W Trip	Total I/S Trips	Poss. Of I/S Trip
9/20/67	17	2	11.76%	5	29.41%	7	41.17%
9/27/67	17	2	11.76%	2	11.76%	4	23.52%
10/ 4/67	16	2	12.50%	4	25.00%	6	37.50%
10/11/67	16	2	12.50%	2	12.50%	4	25.00%
10/18/67	17	2	11.76%	2	11.76%	4	23.52%
10/25/67	18	2	11.11%	1	5.55%	3	16.66%
11/ 1/67	18	3	16.66%	4	22.22%	7	38.88%
11/ 8/67	17	2	11.76%	1	5.88%	3	17.64%
11/15/67	17	2	11.76%	2	11.76%	4	23.52%
11/22/67	16	2	12.50%	2	12.50%	4	25.00%
11/29/67	16	2	12.50%	3	18.75%	5	31.25%
12/ 6/67	15	2	13.33%	1	6.66%	3	20.00%
12/13/67	17	2	11.76%	1	5.88%	3	17.64%
12/20/67	17	2	11.76%	1	5.88%	3	17.64%
12/27/67	16	3	18.75%	3	18.75%	6	37.50%
1/ 3/68	16	2	12.50%	2	12.50%	4	25.00%
1/10/68	16	3	18.75%	-	-	3	18.75%
1/17/68	16	2	12.50%	4	25.00%	6	37.50%
1/24/68	15	2	13.33%	2	13.33%	4	26.66%

Week Ending	# Drivers	Florida Deliveries	Poss. Of Fla. Trip	Trips To Finch Whse	Poss. Of F/W Trip	Total I/S Trips	Poss. Of I/S Trip
10/29/68	18	2	11.11%	0	-	2	11.11%
11/ 5/68	19	2	10.52%	3	15.78%	5	26.32%
11/ 6/68	17	1	5.88%	0	-	1	5.88%
11/13/68	18	1	5.56%	1	5.56%	2	11.11%
11/20/68	15	1	6.67%	2	13.33%	3	20.00%
11/27/68	15	2	13.33%	1	6.67%	3	20.00%
12/ 4/68	16	0	-	1	6.25%	1	6.25%
12/11/68	16	1	6.25%	1	6.25%	2	12.50%
12/18/68	15	1	6.67%	2	13.33%	3	20.00%
12/26/68	15	2	13.33%	2	13.33%	4	26.67%
1/ 1/69	15	1	6.67%	1	6.67%	2	13.33%
1/ 8/69	15	0	-	2	13.33%	2	13.33%
1/15/69	15	1	6.67%	1	6.67%	2	13.33%
1/22/69	16	1	6.25%	1	6.25%	2	12.50%
1/29/69	16	1	6.25%	1	6.25%	2	12.50%
TOTALS	2016	230	1464.30	225	136.77	424	2566.24

Total Number of Driver Weeks (9/9/66 to 1/29/69)	2016.00
Total Number of Weeks (9/9/66 to 1/29/69)	125.00
Average Number of Drivers Per Week (2016 ÷ 125) =	16.13
Total Number of Florida Deliveries (9/9/66 - 1/29/69)	230.00
Average Number of Florida Deliveries Per Week (230 ÷ 125) =	1.84
Average Probability of a Driver Making a Florida Trip in Work Week (1.84 ÷ 16.13) =	11.41%
Total Number of Trips to Finch Warehouse (12/23/66 - 1/29/69)*	225.00
Total Number of Weeks (12/23/66 - 1/29/66)	111.00
Average Number of Trips Per Week To Finch Warehouse	2.03
Average Number of Drivers - - (12/23/66 - 1/29/69) (2016 - 165 = 1851 ÷ 111) =	16.68
Average Number of Finch Warehouse Trips Per Week	2.03
Average Probability of a Driver Making a Finch Warehouse Trip in Work Week (2.03 ÷ 16.68) =	12.17%
Total Number of Interstate Trips 12/23/66 - 1/29/66	424.00
Average Number of Interstate Trips Per Week 12/23/66 - 1/29/66	3.82
Average Probability of a Driver Making an Interstate Trip in Work Week (3.82 ÷ 16.68) =	22.90%

*The foregoing figures do not include interstate deliveries of poultry from the Alabama State Docks Cold Storage Warehouse or delivery to ships.

The Finch Warehouse was the public warehouse in which Fiberboard imprinted with Jiffy Poultry's trademark were stored.

POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-182

JIFFY JUNE FARMS, INC., ET AL., PETITIONERS

v.

JAMES D. HODGSON, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 28a–33a) and its opinion denying rehearing (Pet. App. 36a–40a) are reported at 458 F.2d 1139. The opinion of the district court (Pet. App. 12a–27a) is reported at 324 F. Supp. 664.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1971 (Pet. App. 35a). A timely petition for rehearing was denied on May 17, 1972. The

477-001—72

petition for a writ of certiorari was filed on August 2, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the basis of this record, the courts below correctly held that petitioners had failed to prove that each of their 86 driver-employees came within a statutory exemption to the overtime provisions of the Fair Labor Standards Act.

2. Whether the courts below correctly ruled that the Portal-to-Portal Act's three-year statute of limitations for willful violations (29 U.S.C. 255) applies where petitioners knew of the possible applicability of the Fair Labor Standards Act and determined nevertheless to discontinue overtime payments to their drivers.

3. Whether petitioners' agreement with the union representing their employees that the drivers were not entitled to overtime compensation under the Fair Labor Standards Act, reaffirmed by the union when a grievance was filed by some of the drivers, bars either the employees or the Secretary of Labor from instituting suits under Sections 16(b) and 17 of the Fair Labor Standards Act.[1]

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended (29 U.S.C. 201 *et seq.*), Portal-to-Portal Act of 1947, 61 Stat. 84,

[1] This issue was first raised on appeal in a petition for rehearing.

as amended by 80 Stat. 830, 844 (29 U.S.C. 251 *et seq.*), and Motor Carrier Act of 1935, 49 Stat. 543, as amended by the Department of Transportation Act of 1966, 80 Stat. 931, 939–940 (49 U.S.C. 301 *et seq.*), are printed in the petition for a writ of certiorari (Pet. App. 1a–6a).

STATEMENT

This case involves two consolidated actions brought under the Fair Labor Standards Act—one instituted under Section 16(b) (Pet. App. 3a) by eight present and former driver-employees to recover unpaid overtime compensation, liquidated damages, and attorney's fees, and the other instituted under Section 17 (Pet. App. 4a) by the Secretary of Labor to enjoin further violations of the Act's overtime provisions and to restrain the continued withholding of unpaid overtime compensation due to certain drivers not named in the Section 16(b) suit.

Petitioners claimed that the drivers were exempt from the overtime pay provisions of Section 7 of the Fair Labor Standards Act by virtue of Section 13(b)(1) of that Act (29 U.S.C. (1964 ed.) 213(b)(1)), which provides that:

> The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission [now the Secretary of Transportation] has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act * * *.

The district court denied the Section 13(b)(1) exemption, granted the injunctive relief sought by the

Secretary, and awarded the drivers back wages for three years prior to the commencement of the suit (Pet. App. 26a–27a). The court of appeals affirmed (Pet. App. 28a–33a).

The evidence showed that petitioners are engaged in the production, sale, and distribution of poultry products in Alabama (A. 120–121; Pet. App. 13a–14a). The only deliveries outside Alabama, accounting for .23 percent or less of petitioners' total sales, were to two customers on the Florida border (A. 82–85; Pet. App. 21a). Although petitioners had no formally established truck routes, each driver usually drove in the same general territory (A. 231–232, 258–260). More than one third of the Florida deliveries in 1968 were made by a single driver (Defendants' Exh. 3), and most of the 86 drivers involved made no such deliveries.[2] The drivers also picked up boxes and poultry products which had been delivered from out-of-state to warehouses where they were stored until called for by petitioners' drivers (A. 144–147, 153–154, 160–162, 165–166, 203–205, 224; Pet App. 15a–16a).[3]

Petitioners paid their drivers for overtime in accordance with Section 7 of the Fair Labor Standards Act until August 1966 (A. 180–181). Then, in the

[2] This figure includes the eight plaintiffs in the Section 16(b) action, and seventy-eight individuals benefitted by the Secretary's Section 17 action (A. 48–49; 96–98). The difference between this figure and the "67 working men" referred to in the district court's opinion reflects the fact that several men were added before judgment was entered.

[3] The drivers also loaded trucks. This activity was held below not to be a basis for exemption under Section 13(b)(1), and that holding is not challenged here (see Pet. 16).

course of negotiating a collective bargaining agreement involving an increase in the drivers' hourly wage rate, the newly certified union suggested that the Act did not apply to the drivers, because of the Section 13(b)(1) exemption relied on below by the petitioners (A. 181–182). The drivers filed a grievance which was never submitted to arbitration, since the union and petitioners agreed that the drivers were not entitled to overtime (A. 194–195). The drivers then complained to the Department of Labor (A. 234–235, 285–286); these actions followed.

ARGUMENT

1. The courts below correctly held that the Section 13(b)(1) exemption did not apply to the drivers here, since the "minimum of evidence of interstate activity which is minimal in its scope and minimal in its nature" (Pet. App. 25a) introduced by petitioners failed to show that any of these drivers was subject to the jurisdiction of the Department of Transportation under the Motor Carrier Act (Pet. App. 19a).

Contrary to petitioners' contention (Pet. 9–11, 16), that holding does not conflict with *Starrett* v. *Bruce,* 391 F. 2d 320 (C.A. 10), certiorari denied, 393 U.S. 971, which was concerned with a carrier actively seeking interstate business and which had only one driver, who would, therefore, perform whatever interstate business the carrier might be called upon to handle. In this respect, the single driver was like the pool of drivers in *Morris* v. *McComb,* 332 U.S. 422, who, in the normal operation of the business, were all equally

likely to be called upon to perform such interstate transportation as the shipping public might require.[4] Here the evidence showed that only a few drivers ever handled the Florida deliveries and that petitioners could easily have identified these drivers from their records, but chose not to do so.

In these circumstances, and in light of the settled rule that the Section 13(b)(1) exemption is an "employee" exemption (*Goldberg* v. *Faber Industries, Inc.*, 291 F. 2d 232, 235 (C.A. 7); *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 553; *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C.A. 2), certiorari granted, 326 U.S. 716, certiorari dismissed, 328 U.S. 819), so that every condition for exemption must be shown with respect to each employee for whom exemption is claimed (*Wirtz* v. *C & P Shoe Corporation*, 336 F. 2d 21, 28 (C.A. 5)), the courts below were fully justified in refusing to grant the exemption to all 86 drivers simply because a few of these drivers made deliveries into Florida.[5]

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[4] In *Morris*, "[t]he average number of drivers making one or more [interstate] trips in each week was nine drivers out of 37"; "[t]here were six weeks in which more than half of the drivers * * * engaged directly in interstate commerce"; and there was one week in "which 25 drivers, out of the 32 then on duty, did so" (322 U.S. at 433). As is thus apparent, the drivers in *Morris* "shared indiscriminately" in the performance of the interstate trips which were a "natural" and "apparently inseparable part of the common carrier service of the petitioner and of his drivers" (322 U.S. at 433).

[5] The fact that certain drivers substituted on the Florida run once or twice over a period of several years would not subject the drivers to the safety jurisdiction of the I.C.C.; that

Nor did the courts below misapply the principles of *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 (Pet. 17), in holding that the boxes and poultry products picked up by the drivers had reached their destination when they arrived at the warehouses in Alabama where they were stored until needed by petitioners. They thus were no longer moving in interstate commerce when transported by the drivers within Alabama. The warehouses, like the bulk plant involved in *Baird* v. *Wagoner Transportation Company*, 425 F. 2d 407 (C.A. 6), certiorari denied, 400 U.S. 829, and also in *Mitchell* v. *Livingston & Thebaut Oil Company*, 256 F. 2d 757 (C.A. 5), were "used more in the nature of a storage or inventory facility" (*Baird* v. *Wagoner, supra*, 425 F. 2d at 412), than as a temporary pause in the continuous interstate movement of goods from a manufacturer to a purchaser.

2. The court below held that the word "willful," as used in the Portal-to-Portal Act's three-year statute of limitations, applies to violations committed in reliance on the advice of counsel, with awareness of the possible applicability of the Act, although without intent to evade the Act. This decision not only accords with the construction given this term or its equivalent in other civil legislation (see, *e.g.*, *Local 189, United Papermak. & Paperworkers* v. *United States*, 416 F. 2d 980, 996 (C.A. 5), certiorari denied, 397 U.S. 919;

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jurisdiction does not extend to employees who perform safety-affecting activities only "sporadically and infrequently" and not as "part of their regular duties" (*Wirtz* v. *Tyler Pipe and Foundry Company*, 369 F. 2d 927, 930 (C.A. 5); *Wirtz* v. *C & P Shoe*, *supra*, 336 F. 2d at 29).

Robinson v. *Lorillard Corp.*, 444 F. 2d 791, 796–797 (C.A. 4), certiorari dismissed, 404 U.S. 1006; *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245, 250 (C.A. 10); *Sprogis* v. *United Airlines*, 444 F. 2d 1194, 1201 (C.A. 7), certiorari denied, 404 U.S. 991; *Hewitt* v. *United States*, 377 F. 2d 921, 924 (C.A. 5)), but is required, we submit, by the Act's broad remedial purposes. Petitioners erroneously describe the three-year statute of limitations as "punitive in its effect" (Pet. 18). As pointed out by the court below, however, the three-year statute is part of the Act's civil sanctions (Pet. App. 37a); it is thus clearly compensatory in nature.

3. The court of appeals correctly rejected petitioners' claim that the employees, as well as the Secretary of Labor, were precluded from maintaining suit under the Act to recover the unpaid overtime compensation which certain of the employees had, without success, sought to obtain by invoking the grievance machinery of their collective bargaining agreement. As the court pointed out, and as petitioners' own evidence confirmed, the union proposed the cessation of overtime payments and, when the grievance was filed, supported petitioners' right to stop such payments. In these circumstances, the grievance proceeding was properly characterized by the court below as "a hopeless charade" (Pet. App. 40a).

Even apart from this ruling, it is clear that the maneuverings of individual employees cannot bar the Secretary from instituting action under Section 17 of the Act, since such actions are brought, not for the

benefit of particular employees, but to protect the public interest. See *Wirtz* v. *Jones,* 340 F.2d 901, 904 (C.A. 5); *Wirtz* v. *Malthor, Inc.,* 391 F.2d 1, 3 (C.A. 9). It is well settled, moreover, that the minimum guarantees provided in Sections 6 and 7 of the Act cannot be waived or diminished by contract. See *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 707; *Martino* v. *Michigan Window Cleaning Co.,* 327 U.S. 173, 177–178; *Walling* v. *Hardwood Co.,* 325 U.S. 419.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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